IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 11TH DECEMBER 2006 / 20TH AGRAHAYANA 1928

WP(C).No. 30373 of 2006(N)

E.P. 130/02 IN AS.4/1978 of I ADDL.SUB COURT, KOZHIKODE

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PETITIONER:

THE CORRESPONDENT AND CHAIRMAN
STANDING COMMITTEE, M.E.S.,
CENTRAL COLELGE COMMITTEE,
M.E.S.OFFICE, KOZHIKODE-4,
REP. BY THE GENERAL SECRETARY, MUSLIM EDUCATION
SOCIETY, KOZHIKODE.

BY ADV. SMT.PRABHA R.MENON
SRI.M.KRISHNAKUMAR

RESPONDENTS:

M.SYED MOHAMMED,
S/O.K.P.MOIDEEN, 16/273,
FATHIMA BUILDING, FRANCIS ROAD,
KOZHIKODE-1.

BY ADV. SRI.C.P.MOHAMMED NIAS

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 11/12/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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W.P.(C) NO.30373 OF 2006

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Dated this the 11th day of December,2006

JUDGMENT

In which Sub Court can an order passed by University Appellate Tribunal be executed? Whether it could be executed at the place where the main office of the educational agency is situate? Can it be executed before a Sub Court in whose jurisdiction the educational agency has a private college? whether the order is to be executed only before the Sub Court within whose jurisdiction the particular private college where the respondent worked at the time when the jurisdiction of the University Appellate Tribunal was invoked. These are the interesting questions to be settled in this petition.

2. The factual matrix is as follows:- Respondent was Junior Superintendent of M.E.S College, Kodungallur. He was subsequently transferred to M.E.S. College, Mampad. Respondent approached the University Appellate Tribunal

alleging that he was unlawfully kept out of duty and claimed salary for that period. He also claimed seniority over another employee who was promoted as Junior Superintendent. University Appellate Tribunal granted an order in favour of respondent finding that he is entitled to be posted as Junior Superintendent with effect from 9.2.70. He was granted monetary benefit for the period he was kept out of duty for no fault of his by the Corporate management. The order was challenged before this court. The matter was finally decided by this court in C.R.P.Nos.895/79,1272/79 and 2060/81 on 22.8.85. This court directed the management to pay to the respondent all monetary benefit for the period he was kept out of office. It was also directed to post respondent as Junior Superintendent forthwith. Respondent filed E.P.130/02 before Principal Sub Court, Kozhikode against the management for realisation of the monetary benefits by arrest and detention and also by attachment and sale of the properties of the petitioner management. Executing court originally

passed an order overruling the contention of the petitioner that Sub Court, Kozhikode is not competent to execute the order. That order was challenged before this Court in W.P.(C)37781/03. As per Ext.P1 judgment dated 27.6.06, this court set aside the order of the executing court and directed the executing court to consider the question of want of jurisdiction raised by the petitioner, in accordance with law. Before this court respondent had contended that petitioner did not challenge the jurisdiction of the executing court to execute the order and thereby respondent waived that plea. This court did not decide that question and instead directed the executing court to decide that question also. Thereafter as per Ext.P2 order dated 11.9.06, executing court found that the petitioner did not dispute the jurisdiction at the earliest opportunity and thereby waived the defence based on jurisdiction. The executing court also found that the executive office of the petitioner management is situated within the jurisdiction of Sub Court, Kozhikode and therefore under section 60

(8) of Calicut University Act, (hereinafter referred to as the Act), order of University Appellate Tribunal could be executed before that court. Ext.P2 order is challenged in this petition filed under Article 227 of the Constitution of India.

3. The argument of learned counsel appearing for petitioner was that under sub section 8 of Section 60 of Calicut University Act, an order passed by University Appellate Tribunal could be executed only in that Sub Court having jurisdiction over the area in which the private college is situate and it is to be executed as if it were a decree passed by that Sub court and therefore only that Sub Court, within whose jurisdiction the private college is situate alone has jurisdiction to execute the order. It was argued that petitioner did not work within Kozhikode District and therefore Sub Court, Kozhikode has no jurisdiction to execute the order at all and therefore Ext.P2 order is to be quashed. The learned counsel further argued that

though Section 22(e) of the Legal Service Authority Act provides that an award passed by the permanent Lok Adalat, shall be deemed to be a decree of civil court, the wording in sub section 8 of Section 60 of the Act is different and an order passed by the University Appellate Tribunal could only be treated the decree of that Sub Court, within whose jurisdiction the private College where petitioner had worked at the time when he approached the University Appellate Tribunal or where he worked for which period the claim is raised before the University Appellate Tribunal. Learned counsel also argued that the distinction is clear from the wording of Section 76 of the Kerala Co-operative Societies Act and Section 14 of Kerala Buildings (Lease and Rent Control) Act and a Sub Court gets jurisdiction to execute the order passed by the University Appellate Tribunal only by virtue of sub section 8 of Section 60 and jurisdiction of the executing court goes to the very root of the case and as Sub Court Kozhikode has no jurisdiction, Ext.P2 order is to be quashed as passed without

jurisdiction.

4. Learned counsel appearing for respondent argued that the plea based on the jurisdiction is only a technical plea which could be waived and cannot be agitated at a later stage, if not objected to at the first available opportunity and the judgment debtor is correspondent M.E.S. Central Committee who did not file an objection and the General Secretary of the Muslim Educational Society who had filed an objection at a later stage raising the plea of want of jurisdiction has no right to file objection and as no objection was filed it is to be treated as waived. Reliance was placed on the decision of the Apex Court in **Hira Lal Patni v. Kali Nath (AIR 1962 SC 199), in Church of South India Trust Association v. Telugu Church Council (1996) 2 SCC 520).** Reliance was also placed on the decision of this court in **Muhammed Ismayil v. Malabar Engineering Company (2005(3) KLT 695),** which was relied on by the executing court to arrive at the conclusion in Ext.P2 order. It was further argued by the learned counsel that the main

office of the educational agency is situate within the jurisdiction of Sub Court, Kozhikode and even if it is to be held that Sub Court, Kozhikode has no jurisdiction and execution petition could only be preferred before Sub Court, Manjeri within whose jurisdiction M.E.S. College Mampad is situate, then the execution petition has to be transferred to Kozhikode for effective execution and in such circumstances this court may not interfere with Ext.P2 order passed by the executing court. Reliance was also placed on the decision of Madras High Court in **Thiagaraja Thevar v. Sambasiva Thevar (A.I.R. 1934 Madras 283)**. Finally relying on the decision of the Apex Court in **Roshan Deen v. Preetilal (2002) 1 SCC 100)** learned counsel argued that even if the interpretation of law by the executing court is erroneous, the by-product of that erroneous view is only justice and it may not be erased by invoking the extra ordinary jurisdiction of this court under Article 227 of Constitution of India. Pointing out that petitioner has been fighting for the monetary

benefits upheld by this court for the last more than one and a half decades and therefore the petition is only to be dismissed.

5. Sub section 8 of Section 60 of the Act provides for execution of the order passed by the University Appellate Tribunal. Sub section 8 reads:-

> "Any order passed by the Appellate Tribunal under sub section (7) may be executed through the Subordinate Judge's Court having jurisdiction over the area in which the private college is situate as if it were a decree passed by that court."

Sub section (8) provides that (1) the order passed by the Appellate Tribunal has to be executed before the Court of Subordinate Judge. (2) That court is the court having jurisdiction over the area in which the private college is situate. (3) The order, when sought to be executed, is to be treated

by the Sub Court as the decree passed by that particular Sub Court. Private college has been defined under sub section (16) of Section 2 as "means a college maintained by an educational agency other than the Government or the University and affiliated to the University but shall not include a college which is administered and managed by a society registered under the Societies Registration Act and which is a joint and co-operative enterprise of the Central Government and the Government of Kerala." Educational Agency is defined under sub section (9) of Section 2 "means any person or body of persons who or which establishes and maintains a private college or more than one private college.

6.A reading of sub section (8) makes the position clear. An order passed by the University Appellate Tribunal has to be executed only before a Sub Court. When the order is being executed that Sub Court has to treat the order as if it were a decree passed by that court. The Sub Court which is competent to execute the order, deemed to be the

decree passed by that court, is the court having jurisdiction over the area in which the private college is situate. An execution petition cannot be executed before any Sub Court within whose jurisdiction the educational agency has an office or college. It could only be executed before the Sub Court where the private college is situate. Question is which is the private college? Sub section 8 does not elaborate the identity of the private college. But the order contemplated under sub section 8 is an order passed under sub section 7 in an appeal filed by the employee before the University Appellate Tribunal against a disciplinary proceedings taken against him. If so the private college could only that private college, where the employee was working at the time when the action, which was challenged in the appeal, was taken against him. If so execution petition can be preferred only before that particular sub court within whose jurisdiction that private college is situate. A dispute on the identity of that private college may arise, if the

employee was working in more than one private college and the action challenged before the University Appellate Tribunal relate to the period he working in more than one private college. Even in such a case the private college provided under sub section 8 would only mean, any of the private colleges he had worked for the period relating to the claim raised before the University Appellate Tribunal.For illustration if an employee had worked in five private colleges of the corporate management and the claim raised before the University Appellate Tribunal relates to the period, he was working in three colleges. In that case the private college as provided under sub section and would mean the private college when he was working at the time he preferred the appeal before the University Appellate Tribunal. It would also mean any of the said three private colleges where he working during the period the claim relates if a liberal interpretation is given. But it can never be the other two private colleges where he had not worked during the period

relating to his claim. In any event, it cannot be a private college though under the corporate management, where the employee did not work. It gives no room for doubt that the Sub Court provided under sub section 8 cannot be a Sub Court in whose jurisdiction the main office or any one of the offices or one of the colleges of the educational agency is situate.

7.The question is whether Sub Court, Kozhikode has inherent jurisdiction to execute Ext.P2 order as provided under sub section (8). Though reliance was placed on the decisions of the Apex Court in **Hari Lal Patni v. Kali Nath (supra) and in Church of South India Trust Association v. Telegu Church Counci**l **(supra),** and the decision of this court in **Muhammed Ismayil v. Malabar Engineering Company (supra)** they all relate to the question of territorial jurisdiction of civil court to try the suit. Under section 9 of the Code of Civil Procedure, civil court has jurisdiction to try all suits of civil nature except those which are expressely or impliedly barred by any other law.

Section 16 of the Code provides for institution of the suit where the subject matter situate and section 17 provides for institution of suits where the immovable property is situated within jurisdiction of different courts and section 18 provides for instituting the suit where local limits of jurisdiction of courts are uncertain. Section 21 deals with objections to jurisdiction of the Court. Sub section (1) of Section 21 reads:-

> "(1) No objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice."

Section 21A of the Code provides that challenging the validity of a decree passed in a former suit

between the same parties or between the parties under whom they or any of them claim, no suit will lie on any ground based on an objection as to the place of suing. These provisions underline the basic principle that the objection as to territorial jurisdiction of a court can be waived. If the defendant without raising any objection as to the jurisdiction allows the trial court to proceed with the suit he thereby clearly waives the objection and he cannot subsequently be permitted to raise the objection on territorial jurisdiction. The plea on territorial jurisdiction will be treated only as technical objection which should be taken at the earliest opportunity. The want of jurisdiction to execute the order in the case, cannot be equated with the territorial jurisdiction of a civil court to try the suit. That is a plea or defence available to the defendant which can be waived by the defendant.The jurisdiction of the Sub Court to execute an order passed by the University Appellate Tribunal, as provided under sub section (8) of Section 60 stands on an entirely

different pedestal. A civil court ordinarily cannot execute an order passed by the University Appellate Tribunal. It is only by virtue of the power vested under sub section 8 of Section 60 the civil court, gets the jurisdiction and power to execute the order. Therefore sub section 8 goes to the very root of the jurisdiction of the executing court. If so it cannot be treated as a mere technical plea. It is the very source of the power to exercise the jurisdiction to execute the order. If that be so, unless the private college as provided under sub section 8 of Section 60 is situate within the jurisdiction of Sub Court, Kozhikode, that court will not get jurisdiction to execute the order passed by the University Appellate Tribunal. Under sub section 8 only that Sub Court having jurisdiction over the area in which the private college, as explained earlier, is competent to execute the order. That private college shall be the one where the employee who preferred the appeal before the University Appellate Tribunal worked at the time when the

petition was filed before the University Appellate Tribunal or that private college where the employee was working when the action challenged before the University Appellate Tribunal or one of the said private colleges of the Corporate management where the employee had worked during the period relating to the claim. A Sub Court cannot execute the order for the reason that the main office or one of the offices or colleges of the Corporate management is situate within the jurisdiction of that Sub Court, unless "that private college" is situate within the jurisdiction of that court.

8. Respondent, the employee under the petitioner educational agency admittedly did not work in any of the private colleges at Kozhikode District. In such circumstances, it can only be found that Sub Court, Kozhikode has no jurisdiction to execute the order. Even if it is taken that the question of jurisdiction of Sub Court, Kozhikode was not disputed at the initial stage, it cannot operate as waiver. The failure

to raise objection on jurisdiction will not confer a jurisdiction to Sub Court, Kozhikode as it has no jurisdiction otherwise to execute the order as provided under sub section 8 of Section 60 of the Act. As declared by the Apex Court in **Vithalbhai Pvt. Ltd. v. Union of India (AIR 2005 SC 1891)**"no amount of waiver or consent can confer jurisdiction on a court, which it inherently lacks or where none exists."

9. Then the question is whether the order of the executing court is not to be interfered in exercise of the extra ordinary jurisdiction on the grounds canvassed by the learned counsel appearing for the respondent. It was argued that petitioner caused undue delay in granting the fruits of the order passed by the University Appellate Tribunal and even if the view taken by the executing court was an erroneous view, its by product was justice and therefore Ext.P2 may not be interfered. It was also argued that even if it is found that Sub Court Kozhikode has no jurisdiction ultimately the order

may have to be transferred to Sub Court, Kozhikode for execution of the order as the properties of the management to be proceeded against is situate within the jurisdiction of that court.

10. In **Thiagaraja Thevar's case (supra)** a Division Bench of the High Court of Madras considered the jurisdiction of an executing court where an execution petition was filed at a time when that court had no jurisdiction but later jurisdiction was conferred on that court. The question was whether the execution petition should be dismissed for the reason that when it was first filed, that court had no jurisdiction when subsequently jurisdiction was conferred on that court. Their Lordships held:-

> "There remains therefore only the question whether, assuming that the Court was totally without jurisdiction or could only exercise its jurisdiction irregularly at the time when the present execution petition

was filed if it afterwards obtained jurisdiction before passing the order, it is bound to dismiss the petition merely on the ground that the Court had no jurisdiction at the time when the petition was filed. It has been argued that, because in the converse case, a party who has instituted a suit before a Court has lost jurisdiction is still entitled to have the suit determined by that Court, the same principle must be applied to the case when the Court is vested with the jurisdiction subsequent to the filing of the application, and the Court is bound to dismiss the petition in spite of having jurisdiction to decide

it.

In our opinion the two cases are quite distinct. In the former case the party is not owing to subsequent changes to be deprived of the rights which he had when he began proceedings. But we have been shown no case which holds that the Court is obliged to dismiss a petition which it has jurisdiction to decide at the time when the matter came up for decision merely, because it had no jurisdiction at the time the petition was wrongly entertained. This would not of course mean that limitation could be extended so as to start from the day on which the Court obtained the jurisdiction, but, apart from

> the question of limitation, we do not see why a Court which had jurisdiction to pass orders on a petition is bound to dismiss it on the ground that at the time of the presentation it had no jurisdiction."

That decision relied on by the respondent has no application to the facts of the case. It was a case where executing court originally had no jurisdiction but when the execution petition was pending jurisdiction was conferred on that court. In such circumstances, it was held that there was no need to dismiss the execution petition as another execution petition could be filed before that court immediately as the jurisdiction vested in that court. As far as the Sub Court, Kozhikode is concerned, it has no jurisdiction at all to execute the order in view of the provisions of sub section 8 of Section 60. The question of conferring the jurisdiction later does not arise.

11. Then the question is whether it would be necessary at a later stage, to get the order of the University Appellate Tribunal to be transferred to Sub Court, Kozhikode as canvassed by the learned counsel for respondent for the reason that the properties of the educational agency is situate within the jurisdiction of Sub Court, Kozhikode. As pointed out by learned counsel appearing for petitioner, if the educational agency has property, within the jurisdiction of Sub Court, Manjeri, it may not be necessary to transfer the order to Sub Court, Kozhikode or any other court for execution of the order.

12. Section 24 provides for transfer of a decree on the application of the decree holder for execution to another court. It can be transferred provided the conditions stipulated in sub clause (a) or (b) or (c) or (d) is satisfied. So long as the educational agency has properties within the jurisdiction of Sub Court, Manjeri, it is not necessary to transfer the order for execution to Sub Court, Kozhikode as canvassed by learned

counsel appearing for the respondent. Therefore anticipating that a transfer may be warranted at a subsequent stage, it cannot be said that Sub Court, Kozhikode is competent to execute the order.

13.Learned counsel appearing for the respondent vehemently argued that the counter statement before the executing court was filed not by the respondent but by the General Secretary of the Muslim Educational Society and therefore executing court cannot consider the objection at all. I cannot agree. When the objection relates to the very jurisdiction of the court to execute the order,whether the objection has been raised by the General Secretary or Corporate management the executing court is bound to consider whether it has jurisdiction to execute the order. If under sub section 8 of Section 60 of the Act that court has no jurisdiction, the question whether the General Secretary has filed the objection or the manager of the College filed the objection does not make much difference. As found earlier Sub Court, Kozhikode has no jurisdiction to execute the order.

As the power to execute the order does not vest with that court, no amount of waiver can confer jurisdiction to that court which it inherently lakhs. Though reliance was placed on the decision of the Apex Court in **Roshan Deen v. Preetilal (supra)**the facts and circumstances are vastly different. In that case considering the by product of an erroneous interpretation of law Their Lordships held:

> "We are greatly disturbed by the insensitivity reflected in the impugned judgment rendered by the learned Single Judge in a case where judicial mind would be tempted to utilize all possible legal measures to impart justice to a man mutilated so outrageously by his cruel destiny. The High Court non-suited him in exercise of a supervisory and

extraordinary jurisdiction envisaged under Article 227 of the Constitution. Time and again this Court has reminded that the power conferred on the High Court under Articles 226 and 227 of the Constitution is to advance justice and not to thwart it (vide State of U.P. v. District Judge, Unnao). The very purpose of such constitutional powers being conferred on the High Courts is that no man should be subjected to injustice by violating the law. The lookout of the High Court is, therefore, not merely to pick out any error of law through an academic angle but to see whether injustice has

> resulted on account of any erroneous interpretation of law. If justice became the by-product of an erroneous view of law the High Court is not expected to erase such justice in the name of correcting the error of law."

When the executing court has no jurisdiction at all to execute the order this court has to invoke the supervisory or extraordinary jurisdiction under Article 227 of the Constitution of India to quash Ext.P2 order.

14. Learned counsel appearing for respondent then argued that if it is found that Sub Court, Kozhikode has no jurisdiction to execute the order and the private college where respondent was employed when he approached the University Appellate Tribunal is situate within the jurisdiction of Sub Court Manjeri, then invoking the power provided under section 24 (5)of Code of Civil Procedure this court may transfer the

execution petition to Sub Court, Manjeri. Considering the fact that execution petition was pending before Sub Court, Kozhikode for the last more than three years, in the interest of justice, invoking the power provided under section 24, it is necessary to transfer the execution proceedings to Sub Court, Manjeri. Sub Court, Kozhikode is directed to transfer the execution petition to Sub Court, Manjeri. The Sub Court, Manjeri is directed to dispose the execution petition in accordance with law. The parties are directed to appear before Sub Court, Manjeri on 16.1.07. Sub Court, Manjeri may dispose the execution petition as expeditiously as possible, and in any event, within six months from the date of appearance of the parties before that court.

Writ Petition is disposed as above.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006